In the High Curt of Uttaranchal at Nainital.

Criminal Appeal No. 104/2002
Shyam Lal alias Shyamu
S/o Harish Ram,
R/o Village Preampur Loshagani
Thana Haldwani, Nainital .....Appellant.

Vs.
State of Uttaranchal .....Respondent.

Sri R.B. Agarwal learned counsel for the appellant.
Sri G.S. Sandhu learned A.G.A. for the respondent.
Date of Judgment: 25-05-2004

ORAL JUDGMENT **(Hon'ble M.M. Ghildiyal, J.)**

This is a criminal appeal against the judgment and order dated 11.4.2002 passed by Additional Sessions Judge, Haldwani, District Nainital is sessions trial no. 124 of 1999 whereby the appellant was convicted under section 376 (2)(f) I.P.C. and sentenced to undergo 10 years R.I. and a fine of Rs. 10,000/- and in default of payment of fine to further undergo six months R.I.

2- The appellant was charge under section 376 I.P.C. for having committed rape on Km. Anita aged about 10 years at about 8-30 p.m. on 18-10-1998 near the house of Lila Dhar situated in village Jaipur Bisa within the circle of P.S. Lalkuna, District Nainital.

3- First Information Report of the case was registered at 5.50 p.m. on 19-10-1998 at the instance of informant Nand Kishore (P.W. 1). He is the brother of Lila Dhar, the father of the victim. Lila Dhar is deaf. The informant was told about the incident by the victim and this led to lodging of the F.I.R., Ext. Ka.5 on the basis of the written F.I.R., Ext. Ka.1. Victim Km. Anita (P.W.2) gave out in the trial that appellant took her from her 'Rasoi' at the time of the occurrence outside the house beneath Kathal tree and un-tied her under-wear. The appellant thereafter pressed the male organ against her vagina. It caused her pain whereupon she raised alarm and ran away form there. The appellant also fled away from that spot soon after.

4- The said victim was medically examined by Lady Doctor Shikha Jangpangi (P.W.4) She prepared medical examination report, Ext. Ka.3. Neither any injury on the external part of the body nor on private part was detected and vagina admits of tip of finger with difficulty. She also prepared supplementary report, Ext. Ka.4 and affirmed that the victim was a virgin girl and no rape was committed on her. She also testified that the age of the victim was about 12 years on the basis of the radiological examination. Some abnormality was detected in the anus region therefore the victim was referred to Base Hospital for medical examination in regard to the opinion about Sodomy.

5- To ascertain the above fact victim Km. Anita was also examined by Dr. K.C. Joshi (P.W.6) who found hard scab covered lacerated wound soft tissue deep on anus and the wound was about $2^{1}/2$ days old on 22-10-1998, the dated of the examination.

6- It need to be mentioned that Km. Anita Gave her age as about 12 years during examination in court.

7- The appellant did not admit the accusation o the prosecution and claimed that he has been falsely implicated on account of enmity with the informant as there was some dispute about making payment of money.

8- Learned Additional Sessions Judge on the basis of his appreciation of the evidence found the evidence of the victim reliable and considering the medical evidence in the case came to the conclusion that charge under section 376 (2) I.P.C. has been established beyond doubt against the appellant and convicted him accordingly and passed the sentence as aforesaid.

9- Submission of the learned counsel for the appellant give rise to following two points for consideration in this appeal:-

(1) That the evidence of the prosecution on record is not sufficient to prove that rape had been committed on Km. Anita and that at the most it was a case of attempt to commit such offence and therefore the appellant could have been punished as provided under section 511 of the Indian Penal Code and that the finding of rape as recorded by the learned Sessions Judge is incorrect,

(ii) The victim was not under 12 years of age and therefore the appellant could not have legally been convicted and sentenced under section 376 (2)(f) I.P.C. to award him sentence of 10 years of imprisonment with fine.

10-**Point No.(i):** The submission of the learned counsel that from the evidence itself only a case of attempt to commit rape was at the most established and that the learned Sessions Judge was not justified in coming to the conclusion that even in the absence of penetration of male organ the ingredients of the offence of rape have been established in this case. Attention was drawn on the medical evidence referred above which is definite on the point that the hymen was intact and the victim was found virgin after the incident. It is also evident that on medical examination no injury either external or internal on the private part was detected and only some scar was detected near anus. It thus appear that the appellant made an attempt to commit rape and before he could succeed in accomplishing the intended offence the victim raised alarm and ran away from the place of the occurrence. The evidence of Km. Anita (P.W.2) can not be taken to establish that even slight penetration of the male organ in the vagina had taken place and therefore in the face of her evidence and also the medical evidence I am not inclined to reject the argument of the learned counsel for the appellant. On the face of the facts of the case the reported decision in the matter of **Ranjit Hazarika Vs. State of Assam; (1998) 8 Supreme Court Cases 635** pressed into service by the learned A.G.A. can not be taken to assail the stand taken by the learned counsel for the appellant. The reason is that in the reported case the stress laid was that to constitute the offence of rape, penetration, however slight, is sufficient. Since in the instant case there is no evidence of even slight penetration there fore the reported decision can not squarely be applied to the facts of the case to justify the conclusion of the learned Additional Sessions Judge.

11- For the reasons aforesaid I am of the firm view that the ingredients of the offence of rape were not established from the evidence of the prosecution and that the evidence itself is a prove that

the appellant made an attempt to commit the offence of rape on Km. Anita and therefore the appellant could have only been convicted and sentence for the said offence under section 376 I.P.C. read with section 511 I.P.C. and not under section 376 I.P.C. as has been done by the learned Sessions Judge.

12-Point No.(ii): Learned counsel for the appellant pointed out that the medical evidence on the basis of the radiological examination is that Km. Anita was approximately 12 years of age at the time of the incident. Since there could be difference of one or two years in either side of the approximate age as determined on radiological examination the learned Sessions Judge should not gave held that the victim Km. Anita was under 12 years of age at the time of the commission of the offence. Therefore, the case would not fall under section 376 (2)(f) I.P.C. and the learned Additional Sessions Judge was not justified in convicting and awarding the sentence to the appellant under the said charge.

13- Learned counsel for the appellant submitted that the appellant is in jail and under detention for last 2 years and 6 months and the ends of justice will be satisfied if the appellant is sentenced to imprisonment for the period already undergone. Learned counsel also pointed out that the appellant has no criminal history and is young man of less than 30 years. Considering the facts and circumstances of the case the submission of the learned counsel can not be said to be without substance and in the face of the mitigating circumstances the appellant need to be sentenced for the period already undergone.

14- For the reasons aforesaid I allow this appeal partly. The appellant Shyam Lal instead of his conviction and sentence under section 376 (2) (f) I.P.C. is convicted and sentenced to the period already undergone under section 376/511 I.P.C. The appellant shall be released forthwith, if not wanted in any other criminal case.

15- The record be sent back to the court concerned for compliance and the compliance report be submitted in a month.

(Irshad Hussain, J.)

ISB